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R. Scott Williams, Peter J. Baxter; Strong and Hanni; Eric P. Schoonveld, Jason Watson; Hall Prangle and Schoonveld, LLC; Attorneys for Appellees.

David E. Ross II; David E. Ross II, LC; Attorney for Appellant.

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IN THE UTAH COURT OF APPEALS

LARRY ROTH,
Appellant,

vs.

RONALD JOSEPH, M.D. and
NORTHERN UTAH HEALTHCARE
CORPORATION dba ST. MARK'S
HOSPITAL,
Appellees

Appellate Case No. 20090716-CA

Trial Court Case No. 080901034

REPLY BRIEF OF APPELLANT

Appeal from the Ruling of the Third Judicial District Court,
The Honorable Judith Atherton

R. Scott Williams, Esq.
Peter J. Baxter, Esq.
STRONG & HANNI
3 Triad Center, Suite 500
Salt Lake City, UT 84180

Attorneys for Appellee
Ronald Joseph, M.D.

Eric P. Schoonveld, Esq.
Jason Watson, Esq.
HALL, PRANGLE & SCHOONVELD, LLC
136 East South Temple, Suite 2450
Salt Lake City, UT 84111

Attorneys for Appellee
St. Mark's Hospital

David E. Ross II
David E. Ross II, LC
Bellemarc Bldg Ste 209
1912 Sidewinder Drive
Park City, UT 84060

Attorney for Appellant
Larry Roth

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ARGUMENT

A. Setting aside default and denial of motion for default judgment.

Northern Utah Healthcare Corporation dba St. Mark's Hospital ("St. Mark's") was served in May 2007 with a Notice of Intention to Commence an Action by Roth. [R336] St. Mark's through its attorneys stipulated that a proceeding before the Department of Occupational and Professional Licensing ("DOPL") would serve no purpose [R68] which provided for a certificate of compliance to be issued by DOPL so that Roth could file his lawsuit. [R336] On **March 31, 2008 St. Mark's attorneys received the Summons and Complaint** dated January 17, 2008. [R68] (Emphasis added) The Summons on its face stated that an answer was due within 30 days of service. [R28]. The only reason given for the failure to file an answer to the Summons and Complaint was a non-attorney in the attorneys office incorrectly calendared the due date at 45 days. [R68 and 76-77]. There is no dispute that St. Mark's did not file a timely answer. [See page 6 of St. Mark's Brief acknowledging the due date to answer as April 24, 2008 and they did not file until May 9, 2008].

St. Mark's opens its Argument at page 19 of its Appellee Brief arguing that a trial court is endowed considerable discretion in granting

or denying motions to set aside a default. Roth agrees. St. Mark's cites some cases, mainly federal cases that make relief from a default easier to obtain than relief from a default judgment and argues that it would be an abuse of the court in not granting relief in a case like the one before this Court based upon this less stringent requirement for granting relief.

However, this is contrary to the Utah Supreme Court decision cited in Roth's Brief at pg 22, concluding that Rule 60(b) criteria are applicable to demonstrate "good cause" under Rule 55(c), *See Gold Standard, Inc. v. American Barrick Resources Corp.*, 805 P.2d 164, 168 (Utah 1990) and does not square with a recent decision of this Court. In *Davis v. Goldsworthy*, 184 P.3d 626 (Utah Ct. App. 2008) in a case involving a default, like St. Mark's claim in this case, Goldsworthy's theory was essentially one of excusable neglect. This Court in *Davis v. Goldsworthy*, at 630 *id.* "To demonstrate that the default was due to excusable neglect, '[t]he movant must show that he has used due diligence and that he was prevented from appearing by circumstances over which he had no control.'" Citing *Black's Title, Inc.*, 1999 UT App. 330, ¶10, 991 P.2d 607 (quoting *Airkem Intermountain, Inc. v. Parker*, 513 P.2d 429, 431 (1973)). "Absent such a showing, [a defaulting party]'s assertion does not demonstrate his neglect was excusable." *Id.*

All that the Trial Court had to go on was that the answer was not filed by the deadline and that the only excuse was that a non-attorney staff member for HPS calendared the response date at 45 instead of the required 30 days. There was absolutely no requisite showing of due diligence after the attorneys received the summons and complaint and no showing or even suggestion of any kind that HPS was prevented from appearing by circumstances over which they had no control.

This Court should follow its own precedence as it declared under similar circumstances in Davis v. Goldsworthy, at 630, *id.* “reverse and remand to the trial court for the detailed findings required by Utah case law and for such orders as may then be appropriate.”

B. Discovery of legal injury through due diligence.

Dr. Joseph appears to argue that the burden is on Roth to overcome the trial court’s determination that he discovered his legal injury on October 13, 2004 or at least by January 5, 2005. However, this burden is and has been Dr. Joseph’s to establish. See Conder v. Hunt, 2000 UT App 105, ¶ 14, 1 P.3d 558, *cert. denied*, 9 P.3d 170 (Utah 2000). ¶ 14 "As with any affirmative defense, defendants have the burden of proving every element necessary to establish that the statute of limitations bars [plaintiff's] claim." Seale v. Gowans, 923 P.2d 1361, 1363 (Utah 1996). See Stewart v. K & S

Co., 591 P.2d 433, 435 (Utah 1979); Slayden v. Sixta, 250 Kan. 23, 825 P.2d 119, 122 (1992) (stating "the burden of pleading and proving" statute of limitation's applicability "rests on the defendant").

Dr. Joseph argues that since Roth obtained his medical records on January 5, 2005 the statute of limitations was triggered by at least this date if not the earlier date of October 13, 2004 when Roth admittedly learned of his physical injury. It appears from Dr. Joseph's argument that he is claiming that Roth learned of his legal injury on October 13, 2004 when he discovered that the polypectomy site was not removed during surgery.

However, all this establishes is that Roth learned of his physical injury, but in no way equates to his discovery of his legal injury. The statute of limitations that Dr. Joseph is seeking to invoke is *U.C.A.* §78B-3-404(1). It provides "...malpractice action... shall be commenced within two years after...patient discovers,...the injury..." "Injury" (legal injury) is defined as discovery of injury and the negligence that caused the injury. Foil v.

Ballinger, 601 P.2d 144, 148-9 (Utah 1979). As for obtaining medical records on January 5, 2005, it is an incredulous claim that this established the day Roth knew of his legal injury. This would be like handing someone who does not know Arabic the Quran written in Arabic and then claiming that as of that date they were aware of the teachings of Muhammad.

The law in Utah is clear that in order to invoke the statute of limitations in this case, short of Dr. Joseph delineating some definitive event or date that clearly demonstrates Roth learned of his legal injury, it is for the jury to conclude when this occurred or should have occurred through due diligence. The Utah Supreme Court in a recent case, Daniels v. Gamma West Brachytherapy, 2009 UT 66, ¶31, 221 P.3d 256 (2009) declared,

Tying the statute of limitations' trigger to the discovery of the cause-in-fact of a patient's injury does not leave health care professionals endlessly susceptible to revived claims. Instead, the discovery rule is tempered by a requirement that a patient act with reasonable diligence in investigating a suspected injury. Thus, the statute of limitations begins when exercising such diligence a patient should have discovered his injury and its possible negligent cause. Whether and when a patient should have discovered an injury and its cause is a fact intensive question that requires a jury to determine, given the information available, whether the actions taken in response to an injury and the efforts extended to discover its cause were adequate.

The one record in these voluminous medical records that Dr. Joseph is “hanging his hat on” is an obscure office note of Dr. Voorhees in June 2004. By itself it does not really shed light on any determination that a negligent act occurred. At best it may lead one to further inquiry as to its meaning. That is exactly what Roth proceeded to do. He made inquiry through the depositions of Dr. Joseph and Dr. Voorhees in January 2007 as to the meaning of problems involving the tattoo ink.

In this case it is for the jury to determine when Roth through due diligence should have discovered his legal injury. As we learned from the Daniels v. Gamma West Brachytherapy, case at ¶31, in order for the jury to make this determination they also need to know “....which event it is evaluating for whether the plaintiff was aware or should have been aware of what was the negligent cause of his injury.” Roth on October 13, 2004 was led by Dr. Joseph to believe that the surgeon was responsible [R236 ¶19] causing Roth to concentrate on this causal event, the May 24, 2004 surgery, and not look at Dr. Joseph’s April 28, 2004 treatment.

C. Discovery of Legal injury – Issue Preclusion

Dr. Joseph argues issue preclusion based upon Judge Lindberg’s ruling in the Roth v. Pedersen, 2009 UT App. 313 (unpublished) (attached hereto in the Appendix). The trial court dismissed this case based upon its determination that Roth discovered his legal injury on October 13, 2004 and therefore his filing his statutory notice to commence an action and suit in 2008 was more than two years from this date and therefore the statute of limitations had run. This Court affirmed the dismissal; however, upon different grounds than applied by the Trial Court. This Court rejected the determination that Roth discovered his legal injury on October 13, 2004 and instead determined that by at least the time he initiated a malpractice action

against the surgeon he had discovered his legal injury, some nineteen months later. See Roth v. Pedersen, pg 3 of this Court's unpublished Memorandum Decision (Appendix). In order to use issue preclusion to establish that Roth discovered his legal injury on October 13, 2004, such prior position must have been successful, and in the prior case it was not. See 3D Constr. & Dev., L.L.C. v. Old Standard Life Ins. Co., 2005 UT App 307, ¶11, 117 P.3d 1082, 1085-86 "Under judicial estoppel, 'a person may not, to the prejudice of another person, deny any position taken in a prior judicial proceeding between the same persons or their privies involving the same subject matter, if such prior position was successfully maintained.' " Nebeker v. State Tax Comm'n, 2001 UT 74, ¶ 26, 34 P.3d 180 (quoting Tracy Loan & Trust Co. v. Openshaw Inv. Co., 102 Utah 509, 132 P.2d 388, 390 (1942)).

Furthermore, Dr. Joseph in his Brief at page 28 sets forth the criteria that must be met before issue preclusion is applied, citing Oman v. Davis School District, 2008 UT 70, ¶29, 194 P.3d 956.

(i) the party against whom issue preclusion is asserted must have been a party to or in privity with a party to the prior adjudication; (ii) the issue decided in the prior adjudication must be identical to the one presented in the instant action; (iii) the issue in the first action must have been completely, fully, and fairly litigated; and (iv) the first suit must have resulted in a final judgment on the merits.

Roth is the party in both suits for which Dr. Joseph seeks issue preclusion, so element (i) is met and the memorandum decision in the prior appeal "resulted in a final judgment on the merits." See State v. Baker, 176 P.3d 493, 496 (Utah App. 2008); thus, element (ii) is met. The litigation however, was never completely and fully litigated in that there was no hearings conducted, there was no evidence provided to the Court, and in this jury case no jury was impaneled. Thus element (iii) was not met and as for element (ii) the issue decided is not identical to the issue in the matter at hand. Dr. Pedersen was sued for alleged malpractice that occurred in a surgical procedure on May 24, 2004; whereas, Dr. Joseph is being sued for medical malpractice related to his treatment in a separate causal event in April 2004.

Notwithstanding the foregoing argument, the final decision on the merits in Roth v. Pedersen, pg. 3, *id.*, concluded that Roth discovered his legal injury by May 2006 and as such the statute of limitations in this case would have similarly run in May 2008, some four months after Roth filed suit against Dr. Joseph and St. Mark's.

D. Concealment

Where the June 8, 2004 letter from Dr. Voorhees to Dr. Joseph plays a significant role in this case is that it represents information that Dr. Joseph

had a duty to disclose to Roth after receipt of the letter from Dr. Voorhees. Dr. Joseph was absolutely required to inform Roth that he was experiencing problems with the SPOT ink used to tattoo Roth's polypectomy site and that it was likely Dr. Voorhees failed to remove this cancerous site in the May 24, 2004 surgery, which information was critical for Roth in determining how to proceed in protecting his body. A doctor does have a common law fiduciary duty "to disclose to his patient any material information concerning the patient's physical condition." Nixdorf v. Hicken, 612 P.2d 348, 354 (Utah 1980). See Daniels, 2009 UT 66, ¶51. The question of what is "material information" is for the jury. Nixdorf v. Hicken at 354, *id.*

Roth testified in his affidavit herein, that the first he became aware of the June 8, 2004 letter from Dr. Voorhees to Dr. Joseph was during the deposition of Dr. Joseph in 2007. The fact this letter was not in Dr. Joseph's medical records certainly raises a question for the jury as to why Dr. Joseph concealed this letter from Roth. This certainly raises a material issue of fact.

Dr. Joseph argues that Roth's argument of fraudulent concealment is baseless and Roth was required to prove that Dr. Joseph affirmatively acted to conceal. The law is clear in Utah that a doctor has a duty to disclose to his patient material medical information. Nixdorf v. Hicken, at 354 *id.*

The Court in Charlesworth v. Reynolds, 113 P.3d 1031, 1037 (UT App. 2005) stated, “A fiduciary's breach of the 'duty to speak the truth' is sufficient to establish fraudulent concealment. Russell/Packard Dev., Inc. v. Carson, 78 P.3d 616, *aff'd as to result*, 108 P.3d 741, 752 (quoting Chapman v. Primary Children's Hosp., 784 P.2d 1181, 1186 (Utah 1989)).

Dr. Joseph states that where fraudulent concealment is alleged the circumstances forming the basis of the allegation must be stated with particularity. Roth has stated acts of fraudulent concealment with particularity. Roth pointed to Dr. Joseph’s knowledge of the problems the surgeon experienced in the botched surgery, that it related to his failure to properly tattoo the polypectomy site, his failure to disclose his miscommunication to the surgeon as to the location of the polypectomy site and his failure to disclose to Roth that the surgeon asked Dr. Joseph to promptly perform a colonoscopy in order to determine if the polypectomy site had been removed as he was concerned that it might not have been.

[R1-8]. Dr. Joseph much like the defendant Dr. Veasy in Chapman v. Primary Children’s Hospital, 784 P.2d 1181 (Utah 1989), misdirected Roth away from looking at him for malpractice [R236 ¶19] and although aware of critical medical information that he was required and had a duty to disclose to Roth, he remained silent (concealment). “In this case, however,

the Chapmans' complaint, though drafted in an admittedly 'scattershot' fashion, contains the averments that defendants withheld information regarding the cause of Jennifer's injuries and 'misinformed [the Chapmans] by, among other things, advising them that the brain damage sustained by Jennifer Chapman was an unavoidable event which was not caused by any misconduct on the part of any of the defendants.' This is a sufficiently clear and specific description of the facts underlying the Chapmans' claim of fraudulent concealment to support our conclusion that the requirement of rule 9(b) has been met. See Peteler v. Robison, 81 Utah 535, 553, 17 P.2d 244, 250 (1932).” Roth respectfully submits that he has as well made sufficiently clear and specific description of the facts underlying his claim of fraudulent concealment to support a conclusion that the requirement of Rule 9(b) has been met.

CONCLUSION

The Trial Court did not make the requisite findings to support St. Mark's request for relief for excusable neglect, specifically no findings were made and interestingly nothing was provided by St. Mark's showing due diligence and that it was prevented from appearing by circumstances over which it had no control. This Court should reverse the Trial Court's setting

aside the Default Certificate and remand for the detailed findings required by Utah case law and for such orders as may then be appropriate.

The Order granting Summary Judgment must be reversed as genuine issues of material fact exist as to when Roth discovered or through due diligence should have discovered his legal injury. Specifically there is actually no date provided in the Record that establishes Roth's discovery of both the causal event and the negligence which caused his physical injury. As to when he should have through due diligence discovered the causal event and the negligence is a fact intensive matter for the jury to determine. The Order granting Summary Judgment must be reversed as a genuine issue of material fact exists as to whether Roth was prevented from discovering his legal injury because of the alleged fraudulent concealment of Dr. Joseph.

Issue preclusion is inapplicable in this case and does not support the summary judgment entered herein.

For these reasons, this Court should reverse and remand on the granting of Rule 60(b) relief to St. Mark's and allow the Trial Court to make such findings under Utah law as to whether or not St. Mark's can demonstrate that their failure to timely file an answer to the Complaint was due to excusable neglect. This Court should reverse the Summary Judgment entered in favor of the defendants and allow a jury to decide when Roth discovered the causal event and negligence that caused his injury and/or

determine whether there was fraudulent concealment in order for the Trial Court to then be able to determine whether the statute of limitations ran or had not run in this case.

DATED this 24th day of March 2010.

David E. Ross II
Attorney for Appellant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he mailed a true and correct copy of the foregoing REPLY BRIEF OF APPELLANT and Disc to the following by U.S. Mail, first class, postage prepaid, this 24th day of March 2010:

R. Scott Williams, Esq.
Peter J. Baxter, Esq.
STRONG & HANNI
3 Triad Center, Suite 500
Salt Lake City, UT 84180

Eric P. Schoonveld, Esq.
Jason Watson, Esq.
HALL, PRANGLE & SCHOONVELD, LLC
136 East South Temple, Suite 2450
Salt Lake City, UT 84111

APPENDIX

Roth v. Pedersen, 2009 UT App. 313.

Entered October 29, 2009, as an unpublished Memorandum Decision